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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02-09-2021

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THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP NO.40767 OF 2015

AND

MP NOS.1 AND 2 OF 2015

Dr.R.Rajarithinam

...Petitioner

VS.

Assistant Commissioner (CT),
Sankagiri,
Salem District.

...Respondent

Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records in the proceedings No.Na.Ka.No.547/2015/A3 dated 05.11.2015 on the file of the respondent and quash the same.

For Petitioner : Mr.B.Manoharan

For Respondent : Mr.V.Veluchamy,
Government Advocate.

O R D E R

The auction notice, dated 05.11.2015, issued by the respondent, is under challenge in the present writ petition.

2. The petitioner states that he purchased the land measuring 55 cents in Ernapuram Village, Sankagiri Taluk, Salem District and started a Company in the name and style of 'M/s.Herbalayas Radsafe India Private Limited' and the said company was registered under the Companies Act, 1956 on the file of the Registrar of Companies, Coimbatore.

3. The petitioner further admits that he signed all necessary documents, applications and forms in respect of the above Company registered under the Companies Act. The petitioner states that after sometime, he shifted his residence from Salem and he was not aware of the business of the above Company. However, the business activities of the Company were stopped and it is admitted that the Company is not functioning as of now.



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4. To the surprise of the petitioner, his property in Survey No.144, Ernapuram Village was brought for sale by the respondent in proceedings dated 05.11.2015 for the dues of the abovesaid Company without verifying the records. The petitioner approached the respondent and has stated that he is the owner of the property and the property is not in the name of the Company.

5. In view of the fact that the Company is the defaulter of tax payments, the petitioner made a request to drop proceedings against him as well as against the property owned by him. However, the respondent informed the petitioner that the sale proceedings cannot be stopped until tax arrears are paid. Thus, the petitioner is constrained to move the present writ petition.

6. The learned counsel for the petitioner mainly contended that the Company is the different entity and therefore, the property belongs to the petitioner cannot be auctioned for the purpose of realisation of the arrears of sales tax. The Company was registered under the provisions of the Companies Act, 1956 and the petitioner, admittedly, signed the documents and the application for registration of the Company under the Companies Act, 1956 and he was added as a Director of the said Company. However, he had not participated in the activities of the Company. Under these circumstances, the petitioner states that he is not personally liable to pay the tax default of the Company and the property belongs to him cannot be auctioned for the purpose of realisation of the tax amount.

7. In support of the said contentions, the learned counsel for the petitioner relied on the judgment of this Court in the case of George J. Mathew vs. The Commercial Tax Officer [2002 112 Company Cases 641 Mad], wherein this Court relied on the judgment of the Andhra Pradesh High Court, in the case of Ramnarayan Shahu vs. Commercial Tax Officer, (FAC) [1990 (78) STC 97 (AP)], held that the Directors of a Private Limited Company cannot be proceeded against personally in recovery of the amounts due from the Company except in the manner provided under Section 16-B of the APGST Act and the impugned notice issued to one of the Directors was quashed by the Andhra Pradesh High Court.

8. In an another judgment in the case of Jagteshwar Prasad Bansal and Others vs. State of Uttarakhand and Another [Judgment pronounced on 07.12.2017 in WP No.73 of 2012], wherein in paragraphs 8 and 9, the Uttarakhand High Court at Nainital made the following observations based on Section 2(11)(e) of the Uttarakhand VAT Act, 2005:-

"8. Section 2(11)(e) of the Uttarakhand VAT Act, 2005 (hereinafter



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referred to as the Act) reads as under: -

“(e) an individual, a firm or a company or other body corporate, club, Hindu Undivided Family or any other system of joint family, association of persons, trust, and co-operative society or any other society, whether such society is incorporated or unincorporated, and which carries on such business including buying goods for and selling to its members for a price, fee or subscription, whether in the course of business or not.”

9. Section 12(1) of the Act provides the liability of Directors of private company in liquidation.”

9. Relying on the abovesaid judgment, the learned counsel for the petitioner reiterated that the petitioner is not liable to pay the tax arrears of the Company in which, he was the Director.

10. The counter-affidavit, filed on behalf of the respondent, would reveal that the petitioner and his wife, namely, Mrs. Nirmala Rajarathinam are the only two Directors of the Company, namely, M/s. Herbalayas Radsafe India Private Limited and it was incorporated with the Registrar of Companies, Tamil Nadu on 14.10.2010 and is doing business of all kinds of devices to reduce radiation.

11. The abovesaid M/s. Herbalayas Radsafe India Private Limited filed monthly returns for the assessment year 2010-2011 and admitted the tax payable as Rs.9,89,625/- for the said year and after adjusting the ITC of Rs.3,90,899/- paid the entire balance amount. Subsequently, on audit verification and on cross verification of the correctness of the ITC claimed, it was found that the aforesaid M/s. Herbalayas Radsafe India Private Limited did not purchase any goods from one M/s. Proto World, Chennai having TIN No.33961423184 under the Commodity Code No.2068, during the assessment year 2010-2011 and hence, the entire claim of Input Tax Credit for 2010-2011 became incorrect and therefore, reversal of the said amount was proposed in the notice and the same was affixed on 06.03.2014.

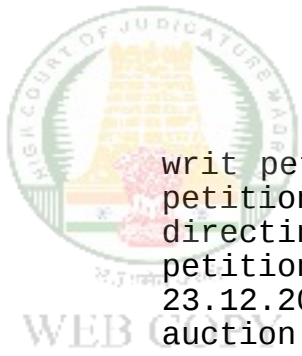
12. Despite the receipt of the notice, no reply was given by the said Company and hence order was passed on 27.10.2014 by the respondent, confirming the ITC reversal of Rs.6,00,840/- along with penalty under Section 27(2) of Value Added Tax Act [hereinafter referred to as the 'VAT Act']. According, Demand Notices in Form 'O' dated 27.10.2014 for Rs.3,00,000/- towards repayment of ITC reversed and for Rs.90,059/- towards penalty under Section 27(4)(i) of VAT Act and Form RR for Rs.1,50,000/-



13. The revision order dated 27.10.2014, passed by the respondent, has not been challenged and the same is still in force. Even after the lapse of one year from the aforesaid notices, the said Company has not settled the dues and therefore, recovery proceedings were initiated by the respondent.

15. On audit verification of the accounts of the dealer and cross verification of the selling dealer, it is found that M/s.Herbalayas Radsafe India Private Limited was in due of huge amount to the Commercial Taxes Department and hence the aforesaid revision proceedings and demand notices were issued to the said Company on 01.11.2014. Despite the receipt, there was no reply and therefore, the property, namely the land in Ernapuram village, which is the only property available, was proposed to be auctioned on 23.12.2015 and a notice dated 05.11.2015 was accordingly issued and sent by RPAD to the dealers' registered address. The said notice returned and undelivered by the Postal Authority with an endorsement 'Unclaimed return to the sender'. Thereafter, the said notice was affixed on the business place on 14.04.2015.

17. On 23.12.2015, the petitioner appeared before the respondent in person and agreed to settle the entire dues of Rs.5,40,059/- in instalments and pleaded not to sell the aforesaid land by auction. Since the auction proceedings cannot be stalled by the respondent, as the same are under the control of the concerned Deputy Commissioner, the same was accordingly informed to the petitioner. Now it is learnt that on the previous day on 21.12.2015, the petitioner had filed the above



writ petition, challenging the auction sale. When the above writ petition came for admission, an order of conditional stay directing to pay Rs.2,00,000/- was passed and accordingly, the petitioner paid the same to the Office of the respondent on 23.12.2015 and in due compliance of the order of this Court, auction sale has been stayed.

18. Neither that the petitioner nor his wife, who are only the shareholders and Directors of the Company, namely, M/s.Herbalayas Radsafe India Private Limited never informed to the Office of the respondent, about the non-functioning of the said Company business nor any other particulars as stated in the affidavit. The petitioner is put to strict proof of the same.

19. With regard to the contentions made in paragraph-4 of the affidavit, the abovesaid Company is a Quasi Private Company and in fact, it is a family entity having petitioner and his wife as shareholders and the property available is now brought to auction sale with sole intention of recovering the statutory dues payable to the respondent. Though the said land stands in the name of the petitioner in his personal capacity, the petitioner and his wife tactfully evading the payment of statutory dues and hence the auction sale should be permitted, so as to recover the arrears.

20. Considering the contentions raised by the parties to the writ petition on hand, this Court is of an opinion that the petitioner himself admitted that the Company was registered and he had signed all necessary documents, applications and forms.

21. The respondent also categorically stated that the petitioner and his wife are only two Directors of the Company, namely, M/s. Herbalayas Radsafe India Private Limited. Further, the monthly returns were filed by the petitioner for the year 2010-2011 and admitted the tax payable. This being the factum established, the liability of the petitioner is to be considered with reference to the provisions of the Act.

22. Section 35 of the Value Added Tax Act, 2006, contemplates the liability of firms. Sub-section (1) enumerates where any firm is liable to pay any tax or other amount under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment.

23. Section 36 of the Value Added Tax Act, 2006 stipulates liability to tax of partitioned Hindu family, dissolved Firm, etc.

24. Section 37 of the Value Added Tax Act, 2006 enumerates liability to tax Private Company on winding up.



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25. Section 26 of the Value Added Tax Act, 2006 speaks about the assessment of legal representatives. It is stated that the Company is not functioning as of now and there are no business activities. Winding up proceedings were initiated is also not stated clearly. However, Section 26 of the Tamil Nadu Value Added Tax Act, 2006 contemplates that the legal representatives are also liable.

26. As far as Section 37 of the Value Added Tax Act, 2006 is concerned, where a dealer is a private company and such company is wound up, every person who was a Director of such company at the time of such winding up shall, notwithstanding such winding up, be jointly and severally liable for the payment of tax, penalty or other amount payable under this Act by such company whether assessment is made prior to or after such winding up unless he proves that the non-payment of tax cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the Company.

27. Thus, two circumstances are to be considered in the present case. Firstly, if the Company belongs to the petitioner is not wound up, then admittedly, the petitioner and his wife are the only two Directors of the Company. In such circumstances, the Directors of the Company are liable to pay the tax. If the petitioner claims that the Company is already wound up, then Section 37 of the Tamil Nadu Value Added Tax Act, 2006 would come into operation and then also they are liable to pay the tax jointly and severally. Thus, in either of the case, the petitioner is liable to pay the tax and he cannot seek any exoneration from the liability of tax.

28. It is pertinent to note that the revision order on 27.10.2014 passed by the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 was not challenged by the petitioner. The order is in force. Even after issuance of notice, the petitioner has not settled the dues. Thus, the respondent has initiated the recovery proceedings.

29. As far as the judgments relied upon by the petitioner are concerned, the one case is relatable to Andhra Pradesh Value Added Tax Act and another case is relatable to Uttarakhand Value Added Tax Act and thus the provisions and the facts and circumstances discussed in those judgments are distinguishable with reference to the facts established in the present case. Thus, the said judgments are of no avail to the petitioner for the purpose of granting the relief.

30. As far as the Tamil Nadu Value Added Tax Act, 2006 is concerned, as narrated above, provisions are available for the purpose of recovery of tax from the Directors of the Company after wound up and even in cases, where the Company is not



functioning, then the Directors of the said Company are liable to pay the tax and in the event of non-payment, the property belongs to the Directors of the Company shall be attached for the purpose of realisation of tax dues.

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31. Even the legal representatives under Section 26 of the Tamil Nadu Value Added Tax Act, 2006 is liable for assessment. This being the Scheme of the Act, no person shall be allowed to escape from the clutches of Taxation Law, merely by stating that he is not personally liable to clear the tax as the Company is failed to pay the tax.

32. Though the Company is the legal entity, the Directors of the Company are the actual functionaries in the Company and therefore, the Directors and the Legal Representatives are liable to pay tax and in the event of failure to pay the same, the Taxation Department is entitled to recover the same by following the procedures as contemplated.

33. This being the principles to be followed, the petitioner has not established any acceptable legal ground for the purpose of interfering with the auction notice order impugned. In view of the fact that the date fixed for the auction of the property is lapsed, the respondent is directed to issue a fresh order for the purpose of auctioning the property in the manner known to law.

34. With the above directions, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar (CS-V)

// True Copy //

Sub Assistant Registrar

Svn

To

Assistant Commissioner (CT),
Sankagiri,
Salem District.

+1cc to the Special Government Pleader(Taxes) SR.No.44952

W.P.No.40767 of 2015

KSM(CO)
RVM(23/09/2021)